THE HON'BLE SRI JUSTICE N.R.L.NAGESWARA RAO

Appeal Suit No.813 of 1994

JUDGMENT:-

The plaintiff in O.S.No.356 of 1988 on the file of the court of Principal Subordinate Judge, Kakinada is the appellant herein.

The suit was filed for specific performance of contract of sale alleging that the defendants are the owner of the suit schedule property and they entered into an agreement of sale on 22-11-1985 agreeing to sell the suit schedule property for a consideration of Rs.95,000/- and received a sum of Rs.50,000/-. The balance is to be paid at the time of registration. On 14-05-1988 the plaintiff paid a um of Rs.15,000/- and it was endorsed on the agreement. In spite of repeated demands and legal notice, the defendants have not executed the sale deed and the plaintiff was ready and willing to perform the contract and, therefore, the suit was filed for specific performance or in the alternative for refund of Rs.65,000/- , which was paid under the agreement.

The defendants filed a written statement admitting the execution of the agreement of sale, but denying the readiness and willingness of the plaintiff to perform the contract. It was pleaded that the time for performance is fixed for three (3) months and the plaintiff has committed default. The payment of Rs.15,000/- on 14-05-1988 and endorsement on the agreement of sale are disputed and it is alleged to be a forged one. As the plaintiff failed to obtain the sale deed, the matter was taken to the police and in spite of interference by the police, the plaintiff has not paid the amount. The plaintiff is residing in the suit premises as a tenant on a rent of Rs.150/- even prior to the agreement of sale. The plaintiff was not paying any amount. Therefore, the defendants pleaded for dismissal of the suit.

On the basis of the above pleadings, the following issues and additional issue have been framed for trial:-

1. Whether the payment endorsement dated 14-05-

1988 for Rs.15,000/- is true, valid and binding?

2. Whether the plaintiff is ready and willing to perform his part of contract?

3. Whether the plaintiff is entitled to specific performance of an agreement of sale?

4. To what relief?

Additional issue:-

Whether the defendants are liable for rents and whether the plaintiff is entitled for a decree of specific performance?

On behalf of the plaintiff PWs.1 and 2 were examined and marked Exs.A-1 to A-10. On behalf of the defendants DWs.1 to 3 were examined and marked Exs.B-1 to B-12.

After considering the evidence on record, the court below did not accept the payment endorsement of Rs.15,000/- under Ex.A-2 on 14-05-1988 and consequently passed a decree for refund of the consideration of Rs.50,000/- and for adjustment of the rent of Rs.150/- per month payable by the plaintiff as a tenant. Aggrieved by the said judgment, the present Appeal is filed.

Now the points that arise for consideration are:-

1. Whether the plaintiff is entitled for specific performance of the contract of sale?
2. Whether the plaintiff is not liable to pay the rents?
3. Whether the plaintiff was always ready and willing to perform the part of the contract?
4. Whether there are any sufficient grounds to interfere with the judgment and decree of the lower court?

POINTS:-

There is no dispute about the execution of agreement of sale Ex.A-1 dated 22-11-1985. Though the defendants have contended that time is essence of the contract and three months time was fixed, it was not mentioned in Ex.A-1. But, at the same time, the parties by subsequent conduct also can fix the time as being essence of the contract. Apart from it, even if time is not the essence of the contract, it is for the plaintiff to

plead and prove readiness and willingness to perform the part of the contract. According to the case of the plaintiff, out of Rs.50,000/- paid the debts under Exs.A-4 and A-6 were discharged and cash consideration of Rs.20,000/- was paid. Evidently, the property was sold by the defendants for discharge of the debts. Therefore, any reasonable prudent man will be anxious to get the sale deed executed at the earliest point of time. From 22-11-1985 till 14-05-1988 when the alleged part payment is said to have been made, there is nothing on record to show that the plaintiff has offered to pay the balance consideration and expressed readiness and willingness. On the other hand, whether it is true or not, the defendants claim that they were ready and the matter was also taken to the police. It is for the plaintiff to prove his readiness and willingness to get the equitable relief. The conduct of the plaintiff has to be taken into consideration whether there was readiness and willingness. It is an admitted fact under Ex.A-10 a registered sale agreement was executed on 01-07-1986 by the defendants in favour of one Malireddy Appa Rao and the plaintiff is aware of the same and he filed the agreement. Therefore, when the agreement in his favour is subsisting and when another alienation has taken place on 01-07-1986, any prudent man would have questioned the defendants and also Appa Rao, but the plaintiff did not choose to question the same. It was sought to be contended that this agreement has been cancelled by virtue of the payment of Rs.15,000/- by the plaintiff and a sum of Rs.5,000/- by the defendants and consequently the agreement is not enforceable. All these facts are not pleaded in the plaint or in the legal notice prior to the filing of the suit. At the time of arguments, it was sought to be canvassed that the payment, to a tune of Rs.15,000/-, was given towards the discharge of the liability to Appa Rao under Ex.A-2, which does not fit in with the claim in the plaint. If really the plaintiff was *bona fide* and the payment endorsement and payment of cash of Rs.15,000/- under Ex.A-2 is true, then he should have been definitely pleaded that the said amount was paid for discharge of a Ex.A-10 agreement. For the reasons best known to the plaintiff the said Appa Rao was not examined. It is contended by

the counsel for the appellant that the defendants admitted that the amount taken under Ex.A-10 was discharged from the money borrowed from the plaintiff. Evidently, this cannot be related to Ex.A-10 and it was not even suggested to him that this amount was paid in discharge of Ex.A-10 contract amount. Further more, even as per the claim of the plaintiff, under Ex.A-1 cash of Rs.20,000/- was paid and, therefore, the discharge of the amount from the own money of the defendants cannot be doubted. Therefore, from the conduct of the plaintiff the endorsement of payment under Ex.A-2 is surrounded by suspicious circumstances leaving apart the fact whether there is variation in the signature or thumb marks as noticed by the lower court. The plaintiff was having knowledge of Ex.A-10 and kept quite for a ling time and has come with a false plea and consequently the relief of specific performance cannot be granted. There is no material evidence of readiness and willingness to perform the contract at all times.

The learned counsel for the appellant contends that during the pendency of this appeal, as the property was attached by virtue of the orders of this court, the amount was deposited in the executing court in another suit and it also shows the *bona fides* of the plaintiff. When once Ex.A-2 endorsement is found to be a not true one, then the relief of specific performance cannot be granted. If the appellant has made any payment towards satisfaction of the E.P.No.49 of 1993 in S.C.No.141 of 1990 on the file of the court of IV Additional Senior Civil Judge, Kakinada, he can recover the same from the defendants. Evidently, the plaintiff is residing in the suit schedule property and the rents which is said to be Rs.150/- per month cannot be said to be unreasonable. Therefore, the lower court has given several reasons for rejecting the claim of the plaintiff for specific performance and the relief being equitable and the discretion exercised by the court below cannot be found to be arbitrary. Therefore, I do not find any reasons to interfere with the judgment of the court below and appeal is liable to be dismissed.

Accordingly, the Appeal Suit is dismissed. No costs.

N.R.L. *NĀGESWARA RĀO*,J

16-11-2012
TSNR